

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98

and

Case 04-CC-090196

RICHARD S. MEYER, an Individual

Henry R. Protas, Esq., of Philadelphia, PA,
for the Acting General Counsel.

Richard S. Meyer, Esq., of Philadelphia, PA,
for the Charging Party.

Stephen J. Holroyd, Esq., of Philadelphia, PA,
for the Respondent-Union.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me on January 22, 2013, in Philadelphia PA, pursuant to a Complaint and Notice of Hearing (the complaint) issued on November 5, 2012¹ by the Regional Director for Region 4 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on September 27, by Richard S. Meyer (the Charging Party or Meyer), alleges that International Brotherhood of Electrical Workers (IBEW), Local 98 (the Respondent or Local 98), has engaged in certain violations of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(b)(4)(ii)(B) of the Act by issuing a \$250,000 fine against Anthony Console with an object of such conduct to force or require LMI Electric, Inc. (LMI) to cease doing business with Post Goldtex LP (Post).

On the entire record, including my observation of the demeanor of the witnesses, and

¹ All dates are in 2012 unless otherwise indicated.

after considering the briefs filed by the Acting General Counsel (AGC)², and the Respondent, I make the following

Findings of Fact

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I. Jurisdiction

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At all material times, LMI has been engaged as an electrical contractor in the construction industry and operates its business from an office in Newtown Square, Pennsylvania. During the past year in conducting its business operations, LMI has performed services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. The Respondent admits and I find that LMI is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 98 is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background and Facts

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Console, as Vice President of LMI, runs the company, bids on prospective jobs, hires manpower necessary to support each contracted project, and provides job site supervision. Console is a member of IBEW, Local 654 with whom LMI has a current collective bargaining relationship.³

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In or around January 2011, LMI was awarded a contract to perform electrical work for Core Realty at Brown and Front Street in Philadelphia (Brown Street job).

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Core Realty operates as a non-union developer and primarily rehabs older buildings for conversion to apartment building complexes. The Brown Street job was entirely staffed by non-union contractors and LMI performed the electrical work for the approximately 126 apartment conversions. Console worked side by side with up to four employees who were not members of Local 98 between January 2011 and June 2012 in completing the work.

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In or around February 2011, Local 98 Business Representative Stephen Wolfe telephoned Console to confirm pursuant to the City of Philadelphia permit that was posted at the Brown Street job that LMI was performing the electrical work for the apartment conversions. Console admitted that he was the contractor performing the work and his employees were not members of Local 98. Within two months after their telephone conversation, Wolfe informed Local 98 Assistant Business Manager Timothy Browne that LMI was performing the electrical work at the Brown Street job without using Local 98 members.

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Wolfe, who had heard a rumor that LMI had been awarded a contract to perform certain electrical work for an apartment building conversion by Post, contacted Console by telephone in March 2012 and suggested that he meet with Local 98 representatives to discuss the matter.⁴

² The AGC's unopposed motion to correct the transcript, dated February 26, 2013, is granted and admitted into the record.

³ Local 654 has jurisdiction in Delaware County, PA, while Local 98's jurisdiction is in the metropolitan Philadelphia area.

⁴ LMI's contract for the electrical service work involved converting power into the building that would be redirected to each apartment electrical panel and the common area electrical

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A meeting was scheduled and held on March 29 at the Local 98 offices.⁵ Attending the meeting for Local 98 were Business Representatives Wolfe, Edward Coppinger, and Bobby Thompson.⁶ Representing LMI were Console and Michael Samcheck, President of Core Realty, for whom Console was still performing work at the Brown Street job. As testified to by all parties, the meeting was cordial and principally dealt with the possibility of LMI having its employees become members of Local 98, the signing of an agreement with Local 98, and the execution of a performance bond. Toward the end of the meeting, Local 98 recommended that Console commence the steps necessary to obtain the performance bond and Console contacted his insurance carrier to initiate the process.

The parties scheduled a second meeting that was held on April 12. In addition to Wolfe and Thompson, Browne attended the meeting and was the principal spokesperson for Local 98. Console and Samcheck represented LMI. According to Console, the tenor of the parties' previous discussions changed during this meeting. In this regard, Browne raised the issue that Console had outstanding legal issues with Local 654 that Console denied, and demanded that LMI enter into an agreement with Local 98 in order to continue working on the Post job. Console testified that Browne said Local 98 would picket the Post project but if you walk away from the job your legal problems will go away.⁷ Console further testified that Browne stated the Post job was non-union, that it was being picketed, the pressure was on, and that Local 98 rather than LMI would be doing the job. Browne denied that he made any statements to this effect and Wolfe concurred. Neither Thompson nor Samcheck were called as witnesses during the hearing, and therefore did not address this or other issues.

On May 15, Coppinger filed internal charges against Console for working with non-union members on the Brown Street job (GC Exh. 3).

By letter dated June 7, Console requested a detailed statement of the facts that form the basis of the charges (GC Exh. 4).

On June 14, Local 98 notified Console that the violations occurred at the Brown Street job approximately between March 2011 and March 2012, when he worked along with three non Local 98 members performing electrical work (GC Exh. 5). The letter informed Console that he was required to appear on July 19 before the Local 98 trial board to present his defense to the charges. Console appeared at the hearing on July 19 and responded to the charges.

On August 16, after reviewing the trial board proceedings, Respondent fined Console \$250,000 for engaging in numerous violations of the Union's Constitution. While Console argued during the course of the hearing that the alleged violations, known by the Union since early 2011, occurred more than a year before the internal charges were filed and were therefore untimely under the Constitution⁸, those arguments were rejected (GC Exh. 7).

boxes and power sources.

⁵ During the course of the meeting, Console admitted that he continued to perform electrical work at the Brown Street job without using Local 98 members.

⁶ There is a dispute whether Browne attended this meeting that will be addressed later in the decision.

⁷ A number of the building trade union's vigorously protested the Post job by picketing and incidents of blocking entrances and violence were reported.

⁸ Article XXV, Section 4 provides: Charges against members must be submitted to the R.S. of the L.U. in whose jurisdiction the act or alleged acts took place within sixty (60) days of the time the charging party first became aware, or reasonably should have been aware, of the

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On September 12, Console filed an appeal with the International Union that is presently pending consideration (GC Exh. 8).

B. Discussion

The AGC alleges in paragraphs 5 and 6 of the complaint that the Respondent, by fining Console, threatened, coerced, or restrained LMI and other persons engaged in commerce or in an industry affecting commerce where an object of the conduct has been to force or require LMI to cease doing business with Post.

An initial issue for consideration is whether the filing of the internal charges against Console was timely under the Respondent's Constitution. Coppinger testified that he learned for the first time at the March 29 meeting that Console was performing electrical work at the Brown Street job from early 2011 through the date of the meeting without using Local 98 members. Thus, the Respondent argues that the internal charges were timely filed on May 15, within 60 days of the time Coppinger learned of Console's violation of the Respondent's Constitutional provisions. The fallacy of this argument is that two other admitted agents of the Respondent had actual knowledge that Console was not using Local 98 members at the Brown Street job as early as February/March 2011. In this regard, Wolfe testified that he had actual knowledge of Console's infractions in February 2011, and he informed Browne within two months after this date. At that time, Browne counseled against bringing charges against Console noting that he was not a member of Local 98. The record establishes, however, that subsequently Local 98 took the exact opposite position by initiating charges against Console, convening a trial board, and fining him \$250,000. *Operating Engineers Local 101 (St. Louis Bridge)*, 297 NLRB 485, 493 (1989) (when the conduct was known for some time a fine evidences an unlawful object). I note that it was only when LMI commenced work on the Post job that Local 98 conveniently determined that Console's lack of membership in Local 98 did not preclude formally initiating charges against him. Moreover, it is telling that Browne who was a witness during the July 19 trial board hearing never mentioned that he knew more than a year earlier that Console was performing electrical work on the Brown Street job without using Local 98 members. Under these circumstances, I find that the underlying charges filed by Coppinger were untimely under Article XXV, Section 4 of the Respondent's Constitution, and therefore, the resulting fine issued against Console should be rescinded (GC Exh. 9).⁹

In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Supreme Court instructed that the proviso means that a union is "free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." The critical inquiry here required by the *Scofield* test, however, is a determination as to whether the Respondent's fining of Console impairs a policy Congress has imbedded in the labor laws, specifically the policy against the application of secondary pressure on neutral employers embodied in Section 8(b)(4) of the Act.

alleged act or acts.

⁹ Respondent's argument that Coppinger was mandated to initiate charges against Console for performing work at the Brown Street job without using Local 98 members or be subject to charges filed against him is unavailing. In this regard, two admitted agents of Local 98, namely Wolfe and Browne, had knowledge of LMI's alleged violations more than a year prior to Coppinger's knowledge but did not file charges against Console. Notably no one, including Coppinger, filed charges against them for violating the Union's constitution or by-laws (GC Exh. 9, Article XXV, section 1(b)).

In the subject case the record shows that the parties during the March 29 meeting, without the presence of Browne, openly discussed working together in an effort to accommodate the needs of both LMI and Local 98 for work opportunities at the Post job.¹⁰ However, the April 12 meeting revealed the true object of Respondent's intentions. In this regard, Browne injected into the discussion unspecified legal issues that existed between Console and Local 654 for the sole purpose of demanding that Console sign an agreement with Local 98 to perform the electrical work at the Post job, and then added "your legal problems will go away if you walk away from the job." I find that Browne never explained what legal issues existed and did not support his statements with any written documentation. Indeed, Console vigorously denied that he had any legal problems with Local 654, and testified he has never received any notification to this effect. A fine imposed on a union member who is also an owner or manager of a secondary employer has a natural consequence of threatening the employer and is violative of the Act. *Ironworkers Local 433 (United Steel)*, 280 NLRB 1325, 1331 (1986).

The Board has held that a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact relied upon, thereby leaving intact the inference of wrongful motive. *Limestone Apparel Corp.* 255 NLRB 722 (1981), enf'd. 705 F. 2d 799 (6th Cir. 1982). I find that the issuance of the fine against Console was for the sole purpose of forcing and requiring LMI to sign an agreement with Local 98, and in effect to force or require LMI to cease doing business with Post.

Lastly, I find that the size of the fine was coercive and did not comport with other fines issued against Local 98 members for similar infractions. Indeed Browne testified about only two other fines for similar conduct, both of which occurred after the date of Console's fine, in the amount of \$75,000 against Local 98 members. Notably, Browne could not recall any situation when Local 98 fined a union member who was affiliated with another IBEW local. *Operating Engineers Local 965 (Elcon Pipeliners)*, 247 NLRB 203, 210 (1980) (the excessiveness or severity of a fine may nevertheless be considered in ascertaining the motive, reason, and purpose of the fine).

For all of the above reasons, I find that an object of Local 98's conduct by the issuance of a \$250,000 fine against Console has been to force or require LMI to cease doing business with Post, and therefore Respondent has violated Section 8(b)(4)(ii)(B) of the Act.

Conclusions of Law

1. LMI Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(b)(4)(ii)(B) of the Act when it issued a \$250,000 fine against LMI's owner Anthony Console with an object of forcing or requiring LMI Electric, Inc. to cease doing business with Post Goldtex LP.

¹⁰ I have determined to credit Console's testimony that Browne did not attend the March 29 meeting. In addition to Console's demeanor and command of the facts in comparison to Browne's rambling and speech like testimony that confused specific dates and times, I find Browne's earlier testimony in the July 19 trial board proceeding that he did not attend the March 29 meeting to be persuasive. (GC Exh. 6).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I find that a broad order should be imposed on Local 98 requiring it to cease and desist from any conduct prohibited by Section 8(b)(4)(ii)(B) of the Act. A broad order is fully justified here, as Local 98 is a repeat offender of the Act. See, *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740 (2004); *Electrical Workers Local 98 (The Telephone Man)*, 327 NLRB 1113 (1999). Indeed, in both cited cases the Board noted by its conduct Local 98 has demonstrated a “proclivity for violating the Act” and a “general disregard for the fundamental rights of employees’ and neutral employers.” As evident by its conduct here, Local 98 has not changed its ways. Under these circumstances, a broad order is both appropriate and necessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local 98, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Fining Anthony Console, an officer of LMI Electrical, Inc., or in any other manner seeking to restrain or coerce LMI Electric, Inc. or any other employer or person engaged in commerce or in any other industry affecting commerce, where the object of such activity is to force or require said employer or persons to cease doing business with Post Goldtex LP, or any other employer with whom we may have a dispute.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fine issued to Anthony Console in order to induce or encourage him to withhold services from a neutral employer with an object of forcing or requiring LMI Electric, Inc. to cease doing business with Post Goldtex LP, and expunge the record of any actions held or taken against him by notifying him in writing that this has been done.

(b) Refund to Anthony Console any moneys held on account of the fine assessed against him in connection with this matter, and reimburse him for expenses he may have incurred in defending against the imposition of the fine.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its union office and hiring hall copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. *Picini Flooring*, 356 NLRB No. 9 (2010). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 11, 2013

Bruce D. Rosenstein
Administrative Law Judge

¹² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

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NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protect4d activities.

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WE WILL NOT fine Anthony Console, an officer of LMI Electric, Inc., or threaten him, or in any other manner seek to restrain or coerce LMI Electric, Inc., or any other employer engaged in commerce or in an industry affecting commerce, where the object of such activity is to force or require said employer or persons to cease doing business with Post Goldtex LP, or any other employer with whom we may have a dispute.

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WE WILL NOT in any like manner restrain you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL rescind the fine issued to Anthony Console in order to induce or encourage him to withhold services from a neutral employer with an object of forcing or requiring LMI Electric, Inc. to cease doing business with Post Goldtex LP, and WE WILL expunge the record of any actions held or taken against Anthony Console by notifying him in writing that this has been done.

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WE WILL refund to Anthony Console any moneys held on account of the fine assessed against him in connection with this matter, and reimburse him for the expenses he may have incurred in defending against the imposition of the fine.

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International Brotherhood of Electrical Workers,
Local 98

(Labor Organization)

Dated _____ By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

615 Chestnut Street, 7th Floor

Philadelphia, PA 19106-4404

Hours: 8:30 a.m. to 5:00 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-5354.